

**AREA PLAN COMMISSION OF TIPPECANOE COUNTY
ORDINANCE COMMITTEE
MINUTES OF PUBLIC MEETING**

DATE.....June 04, 2003
TIME.....4:30 P.M.
PLACE.....COUNTY OFFICE BLDG.
20 N. 3RD STREET
LAFAYETTE IN 47901

MEMBERS PRESENT

Jan Mills
Karl Rutherford
Steve Schreckengast
Mark Hermodson
Gary Schroeder
Jack Rhoda
KD Benson

STAFF PRESENT

James Hawley
Sallie Fahey
Margy Deverall
Jay Seeger, Atty.

Jan Mills called the meeting to order.

I. APPROVAL OF MAY 20, 2003 MEETING MINUTES

KD Benson mentioned that she was listed as attending the May 20, 2003 meeting in error.

Mark Hermodson moved to approve the minutes from May 20, 2003, with the above correction.
Steve Schreckengast seconded and the motion was carried by voice vote.

II. PROPOSED ORDINANCE AMENDMENT TO UZO 6-3-1(D):

Jay Seeger stated that currently the ordinance provides for the imposition of a fine for any violation or enforcement action, but does not allow for recovering the cost and expense of bringing that action. He explained that this amendment would provide that by giving the court the right to assess the legal fees and other expenses when it enters a judgment against an ordinance violation.

Steve Schreckengast asked if that would apply to appeals.

Jay Seeger replied no. He stated that this would only apply to enforcement of zoning violations. He mentioned that the City of Lafayette has similar provisions.

Mark Hermodson moved for approval of the amendment to UZO 6-3-1(d). Steve Schreckengast seconded.

Karl Rutherford asked what the current situation was. He asked for clarification that legal fees could not be recovered.

Jay Seeger stated that was correct. He explained that we could recover fines but that the court is using that as a means of awarding attorney's fees, and that is not what the intent of a fine is supposed to be. He stated that the intent of a fine is punishment to dissuade violators from repeating violations.

KD Benson asked for explanation on the difference between using the wording "will be fined" and "shall be fined".

James Hawley stated that "will" is sometimes permissive.

Jay Seeger stated that there are occasions where the judges make the decision not to impose a fine. He explained that even with this provision, he was trying to make the fine mandatory, of at least the minimum fine of \$100.

KD Benson pointed out that the new amendment uses the word "may".

Jay Seeger stated that the law does not allow us to require the recouping of legal fees. He said that that is always a judge's decision.

Steve Schreckengast asked about the process of recovering fees under this amendment.

Jay Seeger stated that when the judge enters his decision and defines the violation, all the fees up to that point are also charged.

Steve Schreckengast stated that ultimately the judge makes the determination.

Jay Seeger responded affirmatively.

Karl Rutherford asked if the purpose of this amendment was to offset more costs or to be more punitive. He suggested increasing the fines.

Jay Seeger stated that adequate fines are in place, whether or not the judge imposes them or not is the question.

Karl Rutherford asked for clarification that the judge could impose only half of the fine, but still would have to give all the attorney fees.

Jay Seeger stated that the ordinance sets a range of \$100-\$1,500, which can be imposed at a per day rate if the judge chooses. He said that historically judges have imposed a set fee and not a per day fee, but will always award legal fees.

Gary Schroeder asked if a case has ever been lost and if so, is the owner entitled to attorney's fees.

Jay Seeger stated that there was one case last year where the judge did not determine there was a violation. He explained that the ordinance allows the violation to be corrected right up until the judge rules on the case. He said that if the violation is corrected, the case is dismissed and no fees or fines are collected. He stated that there is no reciprocal provision that requires us to pay if the case is lost.

Karl Rutherford stated that he was under the impression that the Commission has no input other than the ordinance. He pointed out that court cases and their status, are never communicated to or discussed with the Commission. He stressed that court cases can be filed, heard and decided on and the Commission is not involved at all.

Jay Seeger stated that was correct. He said that it is not the Commission's role to make decisions on who is prosecuted or what violations are pursued. He explained that once the Commission sets the ordinance stating what is a violation, they cannot decide on cases.

Karl Rutherford stated that he understood that the Commission cannot determine what is a violation, but should have some input on whether or not litigation needs to be taken.

Jay Seeger stated that there are problems every time that area is addressed. He said that from a legal standpoint, there would be issues of due process, conflicts of interest and selective enforcement. He mentioned that if the Commission would like communication informing them of what is going on, then he can provide that.

Karl Rutherford said that his concern is in the wording of the ordinance. He stated that sometimes things move more quickly than he would prefer from identifying the problem to litigation.

Jay Seeger stated that historically cases take 6-8 months.

KD Benson asked if that was 6-8 months to show progress or to finish.

Jay Seeger stated that they do not file suit in that time frame.

Steve Schreckengast asked for clarification that it was the attorney's determination as to when to file suit.

Jay Seeger stated that when the case is referred to him, he reviews it and decides whether to go forward or not.

Steve Schreckengast asked if the attorney had the right to go back the enforcement officer to try to work out a resolution.

Jay Seeger responded affirmatively.

Steve Schreckengast asked about the process of prosecuting a violation.

James Hawley pointed out there is a similar situation in the small towns; the Executive director is involved and mediation is used whenever possible. He stated that in subdivision violations the ordinance is clear that the Executive Director presents it to legal counsel for a determination that a violation has occurred.

The motion carried by voice vote.

III. CONTINUED DISCUSSION ON RE DEVELOPMENT STANDARDS:

Sallie Fahey suggested reviewing all of the changes and then discussing the issues in section (h). She stated that the issues on page 2, sections (f) and (g), have not been addressed yet, because a meeting with Mark Albers still needs to be held. She pointed out that under section (h) there is a new sub-section, (i), which was written by Jay Seeger addressing the concern of an existing easement. She said that she made changes to (h) (ii) which is a middle ground between the two (h) alternatives presented at the last meeting. She explained that for existing roads in easements, instead of having a requirement of simply paving the road or having a road to full RE standards, the compromise is to require 20-foot pavement width, in order to match the RE road width, a grass shoulder or curb and gutter and if required by the Drainage Board, side ditches complying with (i) (iv) below. She said that she also tried to make it clear that reconstructing a private street to access a rural estate road would be an off-site improvement and subject to the bonding provisions. She reviewed and explained the changes in (h) (iv), (v) and (vi).

Jay Seeger explained that section (h) presumes that the existing private street in an easement was granted to the homeowners. He said that the question at the last meeting was whether a new development would cause an overburden on the existing easement and what right those homeowners might have against the owners of the new lots. He stated that the owners of the easement, owners of the land that abuts the easement or owners that would be potentially burdened by the new development, would all have to join in granting a new easement. He said that an outlot would not be created and land would not have to be deeded for an outlot. He explained that all of the owners would simply have to re-grant their easement.

Steve Schreckengast asked if that would apply if the developer gave notice, when the easement went in, that there could be new access through it.

Jay Seeger stated that the developer of the RE subdivision would have to obtain a re-granting of that easement.

Steve Schreckengast asked if that has been done up front if it would still have to be reaffirmed.

Jay Seeger replied affirmatively.

Karl Rutherford stated that a good example would be Kingswood. He explained that the owners of Kingswood knew up front that the back would be developed and a certain size. He mentioned that under the RE standards, that size could be twice as intense.

Steve Schreckengast asked if it was an outlot or an easement in that example.

Karl Rutherford stated that he was just using that as an example.

Steve Schreckengast pointed out that if the owners were told up front that their easement would be used for accessing the land in back and recorded it in the covenants and deeds that should be enough notice.

James Hawley pointed out that the future development of the back area might be for either 1 lot or 12, which is still an overburdening potential. He said that there is no way to predict that and then all the owners would have to re-consent.

Karl Rutherford asked for confirmation that they were only talking about new construction behind existing construction. He said that in Steve Schreckengast's example it would all be new construction which would qualify under the RE statute.

Jay Seeger stated that Steve Schreckengast was referring to something that happened under the old statute. He said that the likelihood of that happening is not great. He explained that if someone purchased land with the understanding that the back area would be developed at a future date, what was allowed to be developed under the old statute, at the time of purchase, may not be the same as what is allowed now.

Steve Schreckengast asked if consent would be needed if that road was an outlot. He stated that most people would want compensation for the use of their easement.

Jay Seeger pointed out that the compensation might be that they are getting an improved road and possibly less maintenance.

Sallie Fahey pointed out that not only would the homeowners be getting an improved road, but also there will be more residents to help maintain it.

Steve Schreckengast stated that if a developer intends to develop additional land, it would make sense to make it an outlot from the beginning.

James Hawley pointed out that most developers really could not have anticipated this change to the ordinance.

KD Benson asked if the problem that existed with Westwood apply to this situation.

James Hawley replied that example dealt with a public street.

KD Benson mentioned that there were a lot of subdivision that already have stub streets present.

James Hawley stated that those were in existing dedicated rights-of-way.

Jay Seeger stated that this would also require all the landowners to join in if the private street was subject to a restrictive covenant that runs with the land. He explained that it might include other homeowners that are not necessarily subject to that easement, except under the homeowners association.

Steve Schreckengast asked for clarification that the developer would still have to obtain re-consent in order to develop land in the back of a development.

Gary Schroeder stated that was correct if he developed under the RE statute. He explained that this only applied to RE developments.

Karl Rutherford said another alternative would be if he accessed it some other way.

Steve Schreckengast asked why this should not also apply to R1 districts.

James Hawley pointed out that R1 has special conditions that require all streets to be public streets.

Karl Rutherford mentioned that it was already more intense than R1.

Jay Seeger stated that the private drives were included with the parcelizations and sliders as a way to access all of those lots. He said that now the developers want to take the larger of those lots and use the RE subdivision to divide them up.

Gary Schroeder asked if Kingswood was originally a parcelization.

James Hawley stated originally it was a slider.

Steve Schreckengast stated that the developer of Kingswood has a large tract that he has been trying to develop into 2-acre lots.

James Hawley stated that he has 10 acres left that he is trying to develop.

Steve Schreckengast stated that the people that live there deserve some protection. He said that there is an advantage to working through the existing subdivision rather than creating a new entrance on a county road.

KD Benson asked what the effect would be to the homeowners if the easement was taken into the county system and became a public road.

James Hawley stated that they would have to be familiar with the ordinance in order to know that was a possibility. He mentioned that they might have to be part of the dedication since they were individual owners.

Sallie Fahey stated that once homeowners dedicated their easements to a public road, then they have lost their right to input on what happens beyond that. She mentioned that in return they receive public maintenance and service.

James Hawley mentioned that there is case law in Tippecanoe County concerning the encroachment on easements that are part of a restrictive covenant. He stated that the court ruled it was a taking against the municipality. He pointed out that they would have to be careful and make sure that every homeowner consents, signs and approves the elimination of their rights or additional use of their covenants.

Steve Schreckengast referred to section (h) (ii) concerning the list of construction materials and asked if that was something that would change in a few years because of the different materials

that will be on the market. He said that he thought the consensus was to use a term that was vague, such as “to current county standards”.

Sallie Fahey stated that these are standards only for private RE roads. She pointed out that neither the Highway Department nor the County Commissioners have an adopted standard for private RE roads. She explained that the Highway Department did provide a sketch of what the road would look like but it is not a part of the adopted County street standards.

Steve Schreckengast asked if there were other materials that could be used.

Sallie Fahey stated that this was a minimum standard developed by Mark Albers, which would allow a good private road that could be added to in order to be the public RE road standards, without having to tear out everything already built.

Karl Rutherford asked for clarification that if this was the minimum standard, extra could be added and Mark Albers could approve it.

Sallie Fahey stated that it is a private road and Mark Albers would not have any authority. She said that it is not referred to as a minimum standard.

Karl Rutherford pointed out that she made the comment a few minutes ago that it was a minimum standard. He asked if she was referring to the fact that it was a minimum in terms of how much was used.

Sallie Fahey replied affirmatively.

KD Benson asked if the wording should include “or better” or “minimum”.

Sallie Fahey pointed out that the entire ordinance represents a minimum standard. She explained that the ordinance asks developers and surveyors to certify that all the standards have been met. She stated that there is not an engineer on the APC staff and the County Engineer does not have any authority on private roads. She pointed out that if it is certified at something other than the standard listed in the ordinance, they would have to ask legal council how to determine that the standard was met.

Brian Keene asked if using the asphalt would be allowed.

Opal Kuhl asked if the wording “or equivalent” or “or equivalent as approved” could be used.

Sallie Fahey asked who would determine what the equivalent is.

James Hawley pointed out that at one time the ordinance listed specific materials that were to be used for parcelization roads and it was taken out because the construction community could not figure out what they meant.

Sallie Fahey mentioned that if asphalt was used on one of these roads, that would probably be in the realm of public road standards.

Steve Schreckengast mentioned that the Farabee Drive construction was using a new kind of asphalt.

Sallie Fahey stated that they were using heavy weight limit asphalt.

Steve Schreckengast asked that if something better came along than what was listed in the ordinance, would they change the ordinance.

KD Benson stated that the ordinance represents the minimum standard, so if something better comes along, it would still be permitted.

Karl Rutherford stated that more representatives from the development community should weigh in on this issue.

Sallie Fahey stated that she would meet with Mark Albers to determine if any adjustments need to be made to sections (f) and (g). She said that after that she would send it out and ask for comments. She pointed out that the same language appears in the UZO and that would also have to be modified. She said that the section of the USO on procedures would also have amendments that are brought before the Committee.

Steve Schreckengast asked for clarification that the requirement for a 900-foot cul-de-sac road has been omitted.

Sallie Fahey replied affirmatively. She stated that she did not bring that section with her to this meeting, but it had been changed in last month's packet. She explained that they were reviewing this in sections, but at the end they would receive the complete packet for review and approval.

KD Benson asked Jay Seeger if the wording of the last paragraph of section (2-b(iii)) was clear.

James Hawley explained the wording behind that and why the Soil and Water Conservation District was listed as a resource. He informed the committee that GIS has the 1997 aerials and APC has the 2000 aerials. He explained that only one more year was needed to fulfill the requirement.

Sallie Fahey stated that the aerial photos are actually the least useful in determining whether the land has been tilled or not. She said that the aerials are most useful for wooded area. She mentioned that when trying to determine whether land has been out of production for three year, the Assessor's records and affidavits from former owners are more accurate.

KD Benson asked if that would be part of the procedural amendments she mentioned before.

Sallie Fahey responded affirmatively.

James Hawley stated that there is a significant amount of grassland that is qualifying for RE subdivisions as opposed to wooded area.

Sallie Fahey stated that some people that are doing infill development have grown grass instead of growing crops.

Steve Schreckengast questioned the wording of section (j) (vii). He said that it sounded like it was no big deal for the County to take over a homeowner's private lane. He suggested changing the wording to include "discretionary" or "according to a decision by the County Commissioners".

Sallie Fahey pointed out that it states "if it has been built or subsequently rebuilt to County Highway Department standards current at the time of request".

Several members stressed that it might be the case.

James Hawley stated that the standard has always been: "to be rebuilt to public road standards at that date."

Sallie Fahey stated that it could be subdivision road standards or RE public road standards.

KD Benson mentioned that the County Commissioners do receive requests, but it is usually for the worst roads in the County.

Gary Schroeder asked if a road was built to standards, if the Commissioners have the discretion to deny the request.

KD Benson responded affirmatively. She mentioned that it might depend on the plowing routes.

Steve Schreckengast asked what would happen if a RE road was built to a public road that was not up to public road standards. He asked if the public road would have to be brought up to public road standards.

Sallie Fahey pointed out that a county road would not have to be brought up to standards. She said that most would connect to county roads and most of them are not up to standards

Next meeting date was set for Tuesday June 17, 2003 at 4:30 p.m.

IV.CITIZEN COMMENTS

V. ADJOURNMENT

Mark Hermodson moved to adjourn. Steve Schreckengast seconded and the motion passed by voice vote.

Respectfully submitted,



Michelle D'Andrea
Recording Secretary

Reviewed by,
James D. Hawley, AICP
Executive Director

